90-1778

CASE NO. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1990

HARRY K. SINGLETARY, Secretary,
Florida Department of Corrections,

Petitioner,

v.

STEPHEN TODD BOOKER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

Whether review should be granted to allow this Court to decide the standard to be applied in determining the harmlessness of any violation of *Hitchcock v. Dugger,* 481 U.S. 393 (1987), a matter left unresolved in the original opinion, and currently the source of irreconcilable conflict between the state and federal courts below.

Whether the Court of Appeals has misapplied *Hitchcock v. Dugger,* in finding any violation thereof in this case to be harmful, when, in reaching such conclusion, the Court of Appeals: (a) considered evidence which had never been presented to the original sentencer in 1978; (b) focused exclusively upon the effect that the excluded evidence would have had upon the jury (when, under Florida's capital sentencing structure, the judge is the sentencer), and (c) failed entirely to consider or weigh the countervailing factors found in aggravation.

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HARRY K. SINGLETARY, Secretary,
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STEPHEN TODD BOOKER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, rendered on January 14, 1991.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 922 F.2d 633 (11th Cir. 1991), and is reproduced in the Appendix to this pleading. [A5-A32].[1]

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1 [A___] represents a citation to the materials contained in the appendix to this pleading.

The decision of the United States District Court for the Northern District of Florida is unreported, and is likewise reproduced in the Appendix to this pleading. [A33-A35].

The decision of the Florida Supreme Court, which denied relief as to the claim now at issue, is reported at 520 So.2d 246 (Fla. 1988), and is also set forth in the Appendix. [A36-A43].

Finally, the opinion of the United States Court of Appeals for the Eleventh Circuit which denied Booker's first petition for writ of habeas corpus is set forth in the Appendix, reported at 703 F.2d 1251 (11th Cir. 1983), as is the decision of the Florida Supreme Court which, on direct appeal, affirmed Booker's conviction of first degree murder and sentence of death, such latter opinion reported at 397 So.2d 910 (Fla. 1981). [A44-A64; A65-A81].

JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit was rendered on January 14, 1991. The Petitioner's timely Petition for Rehearing and Suggestion for Rehearing In Banc was denied on April 12, 1991, and Petitioner's timely Motion to Stay Mandate was granted on April 22, 1991; copies of these orders are reproduced in the Appendix to this pleading. [A1-A4]. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner would contend that the following amendments to the Constitution of the United States of America are involved:

Amendment XIV, which provides, in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any persons of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment VIII, which provides that:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment X, which provides that:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

STATEMENT OF THE CASE

On June 21, 1978, Stephen Todd Booker was convicted of first degree murder, burglary and sexual assault in Alachua County Circuit Court, in regard to the November 9, 1977, murder by stabbing of Lorine Harmon; medical evidence adduced at the trial indicated that the ninety-four year old victim had been brutally raped, beaten and stabbed repeatedly with two butcher knives. A separate penalty proceeding was held the next day, and the jury, by a vote of 9 to 3, returned an advisory sentence of death. Stephen Todd Booker testified at this proceeding, and during his testimony defense counsel sought to elicit testimony in regard to whether Booker would have entered a plea to a lesser offense; defense counsel insisted that the evidence should be admitted, stating, "I would admit to the Court I think it's outside the mitigating circumstances listed in the statute, but I think it is still material and relevant to the issue [which the jury will be deciding]" (Transcript at 588).

During Stephen Booker's testimony at the penalty phase, he advised the jury of certain matters in his past, specifically his prior hospitalizations, his alleged problems with alcohol and memory loss, his alleged remorse and his military service; similarly, there had been testimony during the trial concerning Booker's alleged "split personality" during his confession. There was, however, a great deal of other evidence presented during the course of the trial and sentencing phase which impacted upon the above evidence. Thus, as to Booker's behavior while confessing, the police officer who was present testified that he felt that Booker's "personality change" was "controlled on his part", adding that Booker had seemed "coherent" and "rational in all respects" at all times (Transcript at 375, 378, 385). The officer likewise noted that Booker had only taken on his "demonic personality" or "Aniel", when he had been confronted with physical evidence which he could not explain, *i.e.*, the presence of his

fingerprints on the windowsill of the victim's home or upon her jewelry box (Transcript at 381, 384, 386). Further, the defense psychiatrist who testified at trial, Dr. Carrera, was forced to acknowledge that there were "suggestions" that Booker's "demonic possession" had been a "self-serving phenomenon" (Transcript at 486). The State's expert, Dr. Barnard, offered a similar conclusion, to the effect that any alleged possession would have been a self-serving phenomenon, and this expert affirmatively stated to the jury that such had not been a result of any schizophrenia suffered by Booker (Transcript at 491-492).

Further, as to Booker's prior hospitalizations, both the defense and State expert testified that they had, in fact, considered hospital records relating to such hospitalizations, specifically one from 1973 which included a prior diagnosis of Booker as suffering from organic brain syndrome. Nevertheless, the defense expert, with full knowledge of these records, stated that he could still offer no firm opinion as to Booker's sanity at the time of the offense (Transcript at 479). The defense expert also testified, on cross examination, that Booker had no problem with his immediate memory, that he was oriented, that he had done well on the mental test administered and that he did not exhibit any thought disorder, delusion, hallucination, anxiety or depression (Transcript at 484-485). The State expert, Dr. Barnard, testified unequivocally that Booker had, in fact, been sane at the time of the offense (Transcript at 491). Neither expert diagnosed Booker as currently suffering from any mental problem.

As to Booker's military service, Booker did, indeed, admit on cross examination that he had been honorably discharged. He also, however, offered other significant details of his military service. Thus, at this time, Booker also told the jury that he had been court martialed once and had received eleven (11) Article 15's (Transcript at 590). Booker

also testified that, when stationed in Okinawa, he had made a practice of visiting houses of prostitution and had beaten those found therein with a claw hammer; he estimated that he had attacked at least five persons in this fashion (Transcript at 590-591). Further, as to Booker's alleged remorse, it should be noted that his exact statement was, "If I committed them [the crimes of which he had just been convicted], I would be remorseful." (Transcript at 584). Finally, as to any alleged "serious problems with alcohol and drugs", the record indicates that Booker himself never testified that he had any problems with drugs at all, and, as to alcohol, simply noted that, while others had described any problem as "chronic", he personally could not confirm such (Transcript at 587). Booker, of course, never directly admitted committing the instant offense.

As noted above, the jury in this cause recommended the death penalty by a vote of 9 to 3. During the time which elapsed prior to the formal sentencing before the judge, defense counsel provided to Judge Crews a psychiatric report prepared by another expert, Dr. McMahon. In this report, the doctor concluded that Booker had not been under duress or under the influence of extreme mental or emotional distress at the time of the homicide; she did state, however, that his capacity to conform his conduct to the requirements of the law had "most probably" been "somewhat" impaired. Defense counsel also filed a motion, on July 19, 1978, contending that Florida's death penalty statute conflicted with the recent decision of *Lockett v. Ohio,* 438 U.S. 586 (1978) (State Record at 133-137). The motion was denied on September 14, 1978 (State Record at 141), and sentencing was held on October 20, 1978. At such time, Judge Crews sentenced Booker to death, finding the existence of four (4) aggravating circumstances — that the homicide had been committed by one with a prior conviction for a crime of violence, § 921.141(5)(b), Fla.Stat. (1977), that the homicide had been committed while Booker was

engaged in the commission of a felony, to-wit: burglary and rape, § 921.141(5)(d), Fla.Stat. (1977), that the homicide had been committed for purpose of avoiding arrest, § 921.141(5)(e), Fla.Stat. (1977), and that the homicide had been especially heinous, atrocious and cruel, § 921.141(5)(h), Fla.Stat. (1977). Judge Crews stated that he had considered all of the evidence presented, as well as certain reports and memoranda, and had concluded that there were insufficient mitigating circumstances to outweigh the aggravating circumstances. The judge's specific findings in aggravation and mitigation are quoted in one of the opinions in the appendix. [A73-A79].

Booker appealed his convictions and sentence of death to the Florida Supreme Court, and, among other claims, repeated his contention that the death penalty statute violated Lockett. The Florida Supreme Court affirmed Booker's convictions and sentence in all respects on March 19, 1981, finding expressly that Florida's death penalty statute was not, under *Lockett,* too narrowly defined in the range of mitigating circumstances which the sentencing authority could consider. *See Booker v. State,* 397 So.2d 910, 918 (Fla.), *cert. denied,* 454 U.S. 957 (1981). [A65-A81]. After unsuccessfully seeking collateral relief in the state courts, *see Booker v. State,* 413 So.2d 756 (Fla. 1982), Booker filed his first petition for writ of habeas corpus in federal district court. On April 25, 1983, the Court of Appeals for the Eleventh Circuit affirmed the district court's denial of all relief, and, in so doing, expressly affirmed the district court's finding of procedural bar as to Booker's contention that the instructions given the sentencing jury had violated *Lockett,* in that they had allegedly precluded consideration of non-statutory mitigating circumstances. *See Booker v. Wainwright,* 703 F.2d 1251, 1260 (11th Cir.), *cert. denied,* 464 U.S. 922 (1983). [A44-A64]. The Court of Appeals expressly held that Booker had failed to demonstrate prejudice, so as to overcome the procedural bar, noting, "Booker has not carried his burden in establishing the jury perceived

that in deciding to recommend life or death, it was denied the use of any nonstatutory mitigating factors." *Id.* [A58-A60].

During the course of various death warrants, Booker subsequently unsuccessfully sought post conviction relief in the state and federal courts, on grounds unrelated to the instant proceeding. *See Booker v. State,* 441 So.2d 148 (Fla. 1983); *Booker v. Wainwright,* 764 F.2d 1371 (11th Cir. 1985); *Booker v. State,* 503 So.2d 888 (Fla. 1987); *Booker v. Dugger,* 825 F.2d 281 (11th Cir. 1987). In the above-mentioned decisions of that court, the Court of Appeals announced that Booker's second and third petitions for writ of habeas corpus had constituted abuses of the writ. Finally, on or about July 28, 1987, Booker filed another petition for writ of habeas corpus in the Supreme Court of Florida. In such petition, Booker contended that his sentence of death violated *Hitchcock v. Dugger,* 481 U.S. 393 (1987). On January 14, 1988, the Florida Supreme Court rendered its opinion, *Booker v. Dugger,* 520 So.2d 246, 249 (Fla. 1988), in which it concluded that Booker was entitled to no relief; the Florida Supreme Court expressly found that any *Hitchcock* error was harmless, further finding, "There was simply no nonstatutory mitigating evidence sufficient to offset the aggravating circumstances upon which the jury could have reasonably predicated such a recommendation." [A36-A43]. This Court denied certiorari on June 13, 1988. *See Booker v. Dugger,* 486 U.S. 1061 (1988).

On June 13, 1988, Booker filed his fourth petition for writ of habeas corpus in the federal district court. Booker raised his claim predicated upon *Hitchcock v. Dugger, supra,* and identified ten alleged areas of nonstatutory mitigation which allegedly were not considered at his sentencing. Following a motion to dismiss by the State, and argument by counsel, Judge Paul, on September 19, 1988, rendered his order, granting the writ. The district court found that the

Hitchcock error was not harmless, and its analysis, in its entirety, reads as follows:

> This Court is cautious about speculating on the effect of errors in capital sentencing proceedings, especially in light of the discretion given the sentencer. *See Satterwhite v. Texas,* 108 S.Ct. 1792, 1797-98 (1988). In light of this caution, Respondent has failed to show beyond a reasonable doubt that errors in Petitioner's sentencing proceeding did not affect the outcome. [A33-A35].

On January 14, 1991, the Court of Appeals affirmed the district court's granting of relief. *See Booker v. Dugger,* 922 F.2d 633 (11th Cir. 1991). [A5-A32]. The panel wrote that Eleventh Circuit precedent had limited application of harmless error, under *Hitchcock,* to "instances where the petitioner or counsel made a strategic decision not to present mitigating evidence, or where no nonstatutory mitigating evidence could have been produced." *Booker,* 922 F.2d at 634. [A8]. Citing to this Court's decision in *Skipper v. South Carolina,* 476 U.S. 1 (1986), the *Booker* panel declared that no *Hitchcock* error could be harmless "if the evidence excluded from the jury's sentencing deliberations by a limiting instruction could have had any effect on the jury's recommendation." *Booker,* 922 F.2d at 635. [A8-A9]. The panel then looked to the record, and concluded that it was "beyond cavil" that "significant nonstatutory mitigating factors were excluded from the jury's consideration." *Id.* [A9]. The panel also looked, however, to evidence which "could have been submitted at the sentencing phase if counsel had not believed that the law limited him to statutory mitigating circumstances"; the legal authority cited for this proposition was a concurring opinion in a prior Eleventh Circuit decision, *Knight v. Dugger,* 863 F.2d 705, 759 (11th Cir. 1988) (Clark, J., concurring). *Booker,* 922 F.2d at 636, n.3. [A11]. The *Booker* panel concluded that, because it could not

speculate as to the effect that this excluded evidence would have had on the sentencing body, it could not find the error harmless, "regardless of the number of aggravating circumstances that may have been found." *Id.*, 922 F.2d at 636. [A12]. The State's timely Petition for Rehearing and Suggestion for Rehearing In Banc was denied on April 12, 1991, and its Motion to Stay Mandate was granted on April 22, 1991. [A1-A4].

REASONS FOR GRANTING THE WRIT

I. REVIEW SHOULD BE GRANTED TO ALLOW THIS COURT TO DECIDE THE STANDARD TO BE APPLIED IN DETERMINING THE HARMLESSNESS OF ANY VIOLATION OF *HITCHCOCK v. DUGGER* 481 U.S. 393 (1987), A MATTER LEFT UNRESOLVED IN THE ORIGINAL OPINION, AND CURRENTLY THE SOURCE OF IRRECONCILABLE CONFLICT BETWEEN THE STATE AND FEDERAL COURTS BELOW.

In *Hitchcock v. Dugger,* 481 U.S. 393 (1987), this Court ordered the vacation of the sentence of death before it, because it was clear from the record that, in violation of such precedents as *Skipper v. South Carolina,* 476 U.S. 1 (1986), *Eddings v. Oklahoma,* 455 U.S. 104 (1982), and *Lockett v. Ohio,* 438 U.S. 586 (1978), the Florida advisory jury and sentencing judge had not considered the evidence of nonstatutory mitigation actually presented to them. This Court observed that the respondent had made no attempt to argue that the error was harmless or that it had had no effect upon the jury or the sentencing judge, and that, accordingly, the sentence of death had to be considered invalid. *Hitchcock,* 481 U.S. at 399-400. Petitioner respectfully contends that

the time is right for this Court to grant review and to address the question left unresolved in 1987, namely the standard for harmless error in regard to a *Hitchcock* violation, given the irreconcilable conflict which now exists between the state and federal courts on this question.

Since the rendition of the *Hitchcock* decision in 1987, the state courts of Florida, as well as the federal district courts in Florida and the United States Court of Appeals for the Eleventh Circuit, literally have been flooded with claims premised upon *Hitchcock*. In the approximately forty cases presenting this claim which it has reviewed, the Supreme Court of Florida has adopted a valid and workable harmless error analysis, such analysis involving a detailed consideration of all of the evidence in aggravation and mitigation presented to the sentencer, and a determination as to the effect that the allegedly unconsidered evidence would have had on the jury's recommendation and the judge's ultimate sentence. In this case, the Florida Supreme Court determined, after application of the above standard of review and full consideration of this Court's decision in *Hitchcock*, that any *Hitchcock* error in this case had in fact been harmless. *See Booker v. Dugger*, 520 So.2d 246 (Fla.), *cert. denied*, 486 U.S. 1061 (1988).[2] The Eleventh Circuit, in contrast, has granted relief in *virtually every* case in which a *Hitchcock*

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2 The other cases in which the Florida Supreme Court has concluded that any *Hitchcock* error was harmless include: *Delap v. Dugger*, 513 So.2d 659 (Fla. 1987); *Demps v. Dugger*, 514 So.2d 1092 (Fla. 1987); *Tafero v. Dugger*, 520 So.2d 287 (Fla. 1988); *Ford v. State*, 522 So.2d 345 (Fla. 1988), *cert. denied*, 489 U.S. 1071 (1989); *White v. Dugger*, 523 So.2d 140 (Fla.), *cert. denied*, 488 U.S. 871 (1988); *Smith v. Dugger*, 529 So.2d 679 (Fla. 1988); Jackson v. Dugger, 529 So.2d 1081 (Fla. 1988); *Clark v. State*, 533 So.2d 1144 (Fla. 1988); *Alvord v. Dugger*, 541 So.2d 598 (Fla. 1989), *cert. denied*, ____ U.S. ____, 110 S.Ct. 1834 (1990); *Smith v. State*, 556 So.2d 1096 (Fla.), *cert. denied*, ____ U.S. ____, 110 S.Ct. 1571 (1990); *Heiney v. Dugger*, 558 So.2d 398 (Fla. 1990); *Steinhorst v. State*, 574 So.2d 1075 (Fla. 1991).

claim has been presented, including a number such as a case sub judice, in which the state courts had reached the opposite conclusion.[3] Whereas it is by no means unprecedented for state and federal courts to reach different conclusions based upon the same record, *see, e.g., Sumner v. Mata,* 455 U.S. 591, 598 (1982), the principle of comity is violated when, as here, the courts applied different legal standards. As will be demonstrated below, the Eleventh Circuit has absolutely no uniform standard by which the harmfulness of a *Hitchcock* error is determined, and the standard applied in this case is clearly erroneous. Because of the many conflicts within the Eleventh Circuit itself on this question, which the Court of Appeals recognizes but refuses to correct, and the many conflicts between the Eleventh Circuit and the Supreme Court of Florida, which only this Court can correct, Petitioner respectfully urges this Honorable Court to grant review and to resolve, once and for all, the proper standard for determining the harmfulness of a *Hitchcock* violation.

The Eleventh Circuit has reviewed fourteen (14) Florida cases in which a claim of error premised upon *Hitchcock* has been presented. In three of these cases, the Court of Appeals found any error harmless, due to the fact that no evidence in mitigation was, or apparently could have been, presented. *See, e.g., Clark v. Dugger,* 834 F.2d 1561 (11th Cir. 1987), *cert. denied,* 485 U.S. 982 (1988); *Tafero v. Dugger,* 873 F.2d 249 (11th Cir. 1989), *cert. denied,* ____ U.S. ____, 110 S.Ct. 1834 (1990); *Demps v. Dugger,* 874 F.2d 1385 (11th Cir.

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3 As of this writing, the Eleventh Circuit has, in effect, overruled the Florida Supreme Court and granted relief in two cases, *Delap v. Dugger,* 890 F.2d 285 (11th Cir. 1989), *cert. denied,* ____ U.S. ____, 110 S.Ct. 2628 (1990), and *Jackson v. Dugger,* ____ F.2d ____ (11th Cir. April 29, 1991), in addition to that *sub judice.* Further conflict is inevitable as the other cases cited in n.2 progress through the federal system. *See, e.g., Smith v. Dugger,* 758 F.Supp. 688 (N.D. Fla. 1990) (relief granted by district court based upon Hitchcock) (state appeal pending).

1989), *cert. denied,* ____ U.S. ____, 110 S.Ct. 1834 (1990). In four other cases, the Court of Appeals reversed without absolutely no discussion or analysis as to whether the *Hitchcock* error could have been harmless. *See, Hargrave v. Dugger,* 832 F.2d 1528 (11th Cir. 1987) (in banc), *cert. denied,* 489 U.S. 1071 (1989); *Messer v. Florida,* 834 F.2d 890 (11th Cir. 1987); *Stone v. Dugger,* 837 F.2d 1477 (11th Cir. 1988), cert. denied, 489 U.S. 1071 (1989); *Ruffin v. Dugger,* 848 F.2d 1512 (11th Cir. 1988), *cert. denied,* 488 U.S. 1044 (1989). In the remaining cases, including that *sub judice,* the Court of Appeals has granted relief, based upon a finding that the *Hitchcock* error was not in fact harmless. *See Magill v. Dugger,* 824 F.2d 879 (11th Cir. 1987); *Knight v. Dugger,* 863 F.2d 705 (11th Cir. 1988); *Jones v. Dugger,* 867 F.2d 1277 (11th Cir. 1989); *Delap v. Dugger,* 890 F.2d 285 (11th Cir. 1989), *cert. denied,* ____ U.S. ____, 110 S.Ct. 2628 (1990); *Aldridge v. Dugger,* 925 F.2d 1320 (11th Cir. 1991); *Jackson v. Dugger,* ____ F.2d ____ (11th Cir. April 29, 1991). It is not only impossible to reconcile the results, and the legal analyses applied, in the final group of cases, but it is, importantly, impossible to discern *any* consistency between all of the *Hitchcock* cases decided by the Eleventh Circuit. Indeed, the court is so splintered that in three of the above cases — *Ruffin, Knight* and *Demps* — there is no true majority opinion, in that each of the three judges has written his own.

Specifically, it is beyond peradventure that some panels of the Eleventh Circuit, in determining the harmfulness of any *Hitchcock* error, look to, *inter alia,* the strength of the countervailing findings in aggravation, *see, e.g., Tafero, supra,* 873 F.2d at 252, n.4 (...any *Hitchcock* error was harmless in light of the overwhelming aggravating circumstances...), whereas others, such as the panel *sub judice,* dismiss out of hand any consideration of the existence of aggravating factors. *See, e.g., Knight,* 863 F.2d at 710 (...it is clear that harmless error cannot be made out simply

because multiple aggravating circumstances exist in a given case). The Eleventh Circuit frequently acknowledges that different panels within the court apply different legal standards when resolving a *Hitchcock* claim. *See, e.g., Tafero,* 873 F.2d at 252, n.5 ("We are aware of conflicting viewpoints in this circuit concerning the application of a harmless *Hitchcock* error standard."); *Delap,* 890 F.2d at 306, n.23 ("There is some disagreement in this circuit as to the proper role of the habeas court in weighing aggravating and mitigating evidence in a *Hitchcock* situation."). Shockingly, however, the Court of Appeals has absolutely no interest in resolving this conflict, and has denied those motions for rehearing *in banc,* such as that filed *sub judice* by Petitioner, which sought resolution of this conflict.

Every Florida death row inmate who files a federal petition for writ of habeas corpus will have any adverse ruling upon such reviewed by the United States Court of Appeals for the Eleventh Circuit. Accordingly, the state of Florida is irretrievably prejudiced by the fact that the Court of Appeals has failed to adopt a uniform standard in resolving identical claims of error. Given the fact that the identity of the individual judges on the respective panels of the Eleventh Circuit literally determines whether an inmate lives or dies, a substantial question is presented for this Court to review. *Cf. John Hancock Insurance Company v. Bartels,* 308 U.S. 180, 181 (1939) (certiorari granted due to intracircuit conflict and importance of question presented). Further, the state of Florida is prejudiced because its courts, in contrast to the federal courts, have faithfully applied the dictates of *Hitchcock,* only to have all such labor needlessly undone on federal habeas corpus. This conflict presents a sufficient basis for exercise of this Court's jurisdiction. *See, e.g., Baldwin v. Alabama,* 472 U.S. 372 (1985) (certiorari granted

because of conflict between state supreme court and federal court of appeals). Accordingly, Petitioner respectfully prays that this Court will grant the instant petition for writ of certiorari and resolve the conflict described above.[4]

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4 Petitioner would ask this Court to reject any contention by Respondent to the effect that this case is not "cert worthy" because it presents a question only applicable to capital death defendants in one state. Obviously, the fact that Florida's jury instructions were the focus of the claim of error in *Hitchcock* itself did not dissuade this Court from accepting jurisdiction. Petitioner seeks a grant of certiorari in this case to resolve a matter left open by this Court in *Hitchcock*. Further, Petitioner respectfully suggests that, even if the specific jury instructions at issue in *Hitchcock* are in fact idiosyncratic to Florida, the principle enunciated in *Hitchcock* is universal in application, and Petitioner would also respectfully submit that a strong probability exists that comparable claims of error, in regard to the jury instructions and/or arguments of counsel in the other thirty-seven states which allow capital punishment, can be premised upon alleged violations of the holding of *Hitchcock*. *See, e.g., Richardson v. Thigpen*, 883 F.2d 895 (11th Cir.) (*Hitchcock* claim raised by Alabama petitioner), *cert. denied*, ____ U.S. ____, 110 S.Ct. 17 (1989).

II. THE COURT OF APPEALS HAS MISAPPLIED *HITCHCOCK v. DUGGER*, IN FINDING ANY VIOLATION THEREOF IN THIS CASE TO BE HARMFUL, WHEN, IN REACHING SUCH CONCLUSION, THE COURT OF APPEALS: (A) CONSIDERED EVIDENCE WHICH HAD NEVER BEEN PRESENTED TO THE ORIGINAL SENTENCER IN 1978; (B) FOCUSED EXCLUSIVELY UPON THE EFFECT THAT THE EXCLUDED EVIDENCE WOULD HAVE HAD UPON THE JURY (WHEN, UNDER FLORIDA'S CAPITAL SENTENCING STRUCTURE, THE JUDGE IS THE SENTENCER), AND (C) FAILED ENTIRELY TO CONSIDER OR WEIGH THE COUNTERVAILING FACTORS FOUND IN AGGRAVATION.

While Petitioner respectfully maintains that the panel opinion in this case is the direct result of the confusion and conflict described above, the legal analysis performed by the panel is nevertheless incorrect, regardless of its genesis. The panel in this case committed a number of errors, all of which produced the unjust result at bar.

A. Any Alleged Hitchcock Violation Must Relate Only To The Evidence Actually Presented, And Allegedly Unconsidered, At Sentencing

Initially, the panel began its analysis by stating that a *Hitchcock* error could only be harmless in situations in which "the petitioner or counsel made a strategic decision not to present mitigating evidence or where no nonstatutory evidence *could* have been produced.", *Booker,* 922 F.2d at 634

(emphasis supplied) [A8]. In other words, the *Booker* panel found that if any mitigating evidence *could* exist, at any point in time, a *Hitchcock* error could never be harmless. These holdings owe nothing to this Court's decision in *Hitchcock*, and are entirely a creation of the Eleventh Circuit. In *Hitchcock*, this Court concluded that constitutional error had occurred because the jury had been instructed not to consider evidence which was actually before it. The only proper inquiry under *Hitchcock* is to determine whether there was, in fact, nonstatutory mitigation in the record which was not considered by either the judge or jury, not whether there "could" have been such evidence, or if there was not, the reason for such omission. Obviously, these latter considerations greatly expand the holding of *Hitchcock* into areas neither contemplated, nor intended, by this Court. It is undoubtedly a simply matter for a capital defendant such as Booker, who has been on death row for the last twelve years, to come forward with additional itigating evidence which, with hindsight, allegedly "could" or "should" have been presented in 1978. Indeed, Booker has, unsurprisingly, chosen to do so, and the panel below has awarded relief simply due to the existence of this evidence, although such was *never* presented to the judge and jury in this case. *See, Booker,* 922 F.2d at 636, n.3 (discussion of evidence which "could have been submitted at the sentencing phase.") [A11]. Traditionally, claims involving "unpresented" evidence relate to either allegations of ineffective assistance of counsel, *cf. Strickland v. Washington,* 466 U.S. 668 (1984), or the State suppression of evidence, *cf. United States v. Bagley,* 473 U.S. 667 (1985). Both require a showing of prejudice, in order for a petitioner to merit relief. Here, Booker has been awarded a new sentencing hearing simply by showing the existence of mitigation, both inside and outside of the record, and a talismanic incantation of this Court's decision in *Hitchcock*. Unfortunately, Booker is by no means the only Florida death row inmate who has been

awarded relief by the Eleventh Circuit on this basis. *See Knight v. Dugger,* 863 F.2d at 795 (11th Cir. 1988) (Clark, J., concurring). This Court should grant certiorari and clarify the proper scope of its holding in *Hitchcock.*

B. In Determining The Harmfulness Of Any *Hitchcock* Violation, The Role Of The Sentencing Judge Must Be Considered

The *Booker* panel then goes to observe that a *Hitchcock* error can never be harmless "if the evidence excluded from the jury's sentencing deliberations...could have had any effect on the jury's recommendation.", citing this Court's decision in *Skipper v. South Carolina,* 476 U.S. 1 (1986), in support of such proposition. *Booker,* 922 F.2d at 635. [A8-A9]. This analysis is likewise seriously flawed. Initially, it must be noted that the panel in this case focuses exclusively upon the advisory jury and what effect the omitted evidence would have had upon their recommendation. No doubt, this is due to binding precedent within the Eleventh Circuit. *See, e.g., Ruffin v. Dugger,* 848 F.2d at 1518, n.8 (in determining harmlessness of *Hitchcock* error, Florida jury is treated as the sentencer for Eighth Amendment purposes); *Jones v. Dugger,* 867 F.2d at 1280 (judge's consideration of nonstatutory mitigation meaningless in determination as to whether *Hitchcock* error harmless). While this is an interesting point of view, it is, of course, entirely contrary to Florida's capital sentencing structure. As this Court has recognized, when upholding the constitutionality of such, the jury's sentencing recommendation is advisory only and, under § 921.141(3), Fla.Stat. (1977), the judge is the sentencer in Florida for all purposes. *See, Proffitt v. Florida,* 428 U.S. 242, 252-253 (1976) (...in Florida the sentence is determined by the trial judge rather than by the jury); *Parker v. Dugger,* ____ U.S. ____, 111 S.Ct. 731, 735 (1991).

When the Florida Supreme Court found the *Hitchcock* error in this case to be harmless, that court was well aware of how Florida's capital sentencing structure worked. The Florida Supreme Court concluded that, even with proper instruction in this case, the jury would still have recommended life, in that there was "simply no nonstatutory mitigating evidence sufficient to offset the aggravating circumstances upon which the jury could have reasonably predicated such recommendation", *Booker,* 520 So.2d at 249 [A42]; the Florida Supreme Court also found that it was convinced beyond a reasonable doubt that the judge would have sentenced Booker to death, regardless of the jury's recommendation, and that an override of such recommendation would have been upheld under Florida law. *Id.* [A42]. Given the Eleventh Circuit's willful refusal to acknowledge how Florida's capital sentencing structure operates, grant of certiorari is undoubtedly appropriate in this case. *Cf. Wainwright v. Goode,* 464 U.S. 78 (1983).

The fact that the judge is the ultimate sentencer is a significant factor in any harmless error analysis, and especially so in this case. Thus, even though it would appear that the jury in this case did in fact receive instructions comparable to those in *Hitchcock,* it has by no means been established that the sentencing judge himself followed these instructions. The penalty phase before the jury in this case took place on June 22, 1978. This Court rendered its opinion in *Lockett v. Ohio* on July 3, 1978. On July 19, 1978, defense counsel filed a motion to strike the death penalty on the grounds that Florida's death penalty statute conflicted with *Lockett.* This motion was denied on September 14, 1978, and formal sentencing did not take place before the judge until October 20, 1978. Given the fact that *Lockett* was the law of the land at the time that this death sentence was imposed, the Eleventh Circuit would seem to have ignored this Court's recent decision, *Parker v. Dugger, supra,* in presuming that the sentencing judge in this case did not, in fact,

follow the law. Additionally, it would certainly appear, from the sentencing order, that the judge did in fact consider all of the evidence presented and that his rejection of the allegedly nonstatutory mitigation now at issue was based upon a finding of lack of merit, as opposed to any difficulty he had in formally categorizing such. Thus, the judge, in sentencing Booker to death, rejected the evidence presented concerning the "Aniel syndrome", not because it did not rise to the level of statutory mitigation, but because it was "irrelevant, most likely self-serving, and...bereft of any believable fact"; the judge likewise found Booker to be "the manipulative master of his actions at the time of the crimes." (Record at 142-150) [A75]. Likewise, the judge did not reject the evidence presented as to Booker's mental state, due to its failure to rise to a statutory mitigating factor, but rather due to the fact that it was not mitigating; the sentencing order included the following finding,

> Booker has been an anti-social, hostile, somewhat paranoid individual who learned at an early age that 'he could easily obtain what he wanted by illegal means and that he could control others through fear and manipulation.'

(Record 142-150) [A74]. Due to the Court of Appeals' failure to take into account this Court's recent decision in *Parker,* certiorari should be granted.

C. In Determining The Harmfulness Of Any *Hitchcock* Violation, The Existence Of Aggravation Must Be Considered

Petitioner also respectfully submits that the mere presentation of mitigation *per se* in this, or any other, Florida capital case, is meaningless.[5] Mitigation evidence does not exist in a vacuum. Florida's capital sentencing procedure involves a weighing of aggravating and mitigating factors. *See, e.g., State v. Dixon,* 283 So.2d 1 (Fla. 1973), *cert. denied sub. nom, Hunter v. Florida,* 416 U.S. 943 (1974). It is pointless, as did the panel below, to focus solely upon one side of the scale. Likewise, in the weighing of aggravating and mitigating circumstances, the sheer number of either is not a factor, *see, e.g., Elledge v. State,* 346 So.2d 998, 1003 (Fla. 1977) (capital sentencing not mere counting process), and, contrary to any suggestion in the panel opinion below, Petitioner has never argued that the *Hitchcock* error *sub judice* was harmless due to the *number* of the aggravating circumstances. What Petitioner has consistently argued is that the *Hitchcock* error in this case was harmless due to the *weight* of the aggravating circumstances.[6] One reading only the Eleventh Circuit's decision below in this case, would be totally unaware that Booker's crime is one of the most

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This is particularly true, given the recognition by the author of the *Hitchcock* decision, that the scope of what evidence may be considered mitigating is virtually unlimited. *See Walton v. Arizona,* ____ U.S. ____, 110 S.Ct. 3047, 3052 (1990) (Scalia, J., concurring).

6 As noted earlier, at least one panel of the Eleventh Circuit, *i.e.*, that which decided the *Tafero* case, is apparently amenable to this type of argument, inasmuch as that panel found the *Hitchcock* error before it harmless due to "the overwhelming aggravating circumstances". *Tafero,* 873 F.2d at 252, n.4. It was Petitioner's misfortune that this case was assigned to a different panel of the Eleventh Circuit, which, in turn, applied its own, and different, harmless error analysis.

heinous in Florida's history, that it involved a convicted felon beating, stabbing and raping a ninety-four year old woman, as he burglarized her apartment; a prior panel of the Eleventh Circuit described, in some detail, how Booker had "raped and tortured" the victim *sub judice*. *Booker,* 764 F.2d at 1350. In his sentencing order, the state court judge noted the grievious suffering which the victim was forced to endure, as she was repeatedly stabbed with two butcher knives, brutalized and degraded. Thus, this was no "run of the mill" felony murder. Unlike the panel below, the judge and jury in 1978 did not close their eyes, or ears, to the evidence presented in aggravation. Petitioner again respectfully suggests that any court, performing a proper harmless error analysis under *Hitchcock,* cannot fail to take into account the weight of the factors found in aggravation; the Florida Supreme Court undoubtedly did, when it found the *Hitchcock* error in this case harmless. *Booker,* 520 So.2d at 249 [A42].[7]

Finally, Petitioner contends that the Eleventh Circuit's reliance upon this Court's decision in *Skipper,* as standing

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7 The Florida Supreme Court likewise noted the insubstantiality of the evidence proffered in mitigation in finding the *Hitchcock* error harmless. *Booker,* 520 So.2d at 249 [A40-A41]. Thus, the court noted that, while there was indeed testimony from Booker concerning his "demonic possession" at the time of the confession, both experts who testified at the trial suggested that such had been a "self-serving" act on Booker's part. *Id.* Similarly, the court noted that, regardless of any prior hospitalizations or diagnosis, Booker's expert at trial had been unable to identify any specific mental abnormality and the State's expert had found Booker to be sane and not suffering from organic brain syndrome. *Id.* [A40-A41]. The court could likewise have noted that, even if Booker did receive an honorable discharge from the military, there was also substantial evidence as to Booker's misconduct in the military, including the fact that he had been court martialed, received numerous disciplinary reports, and had, while stationed in Okinawa, beaten five people with a claw hammer; the first Eleventh Circuit panel to review this case noted the latter evidence. *Booker,* 703 F.2d at 1257-1259 [A53-A56]. The panel below, which granted relief, ignored all of the above.

for the proposition that no *Hitchcock* error can be harmless if the allegedly omitted evidence "could have had any effect" on the sentence, is misplaced. This Court has previously rejected the "any effect" standard and has correctly recognized that such amounts to no standard at all. Thus, in *United States v. Valenzuela-Bernal,* 458 U.S. 858, 867 (1982), this Court rejected the proposition that, in establishing a Sixth Amendment violation stemming from the government's deportation of potential defense witnesses, the defendant need only show that the witnesses would have been of some "conceivable benefit" to the defense. This Court observed,

> Given the vagaries of a typical jury trial, it would be a bold statement indeed to say that the testimony of any missing witness could not have 'conceivably benefited' the defense. To us, the number of situations which would satisfy this test is limited only by the imaginations of judges or defense counsel.

Id., 458 U.S. at 866-867.

This Court relied upon *Valenzuela-Bernal* in *Strickland v. Washington,* when, in formulating the "prejudice" prong, this Court specifically rejected the contention that, in order to merit relief due to deficient performance of counsel, a defendant need only show that the error of counsel "had some conceivable effect on the outcome of the proceeding", noting, "Virtually every act or omission of counsel would meet that test", *Washington,* 466 U.S. at 693-694. *See also United States v. Agurs,* 427 U.S. 97, 109 (1976) (prosecutor not required to disclose to defense "everything that might influence the jury" in that such would require complete discovery of all files). Petitioner recognizes that, in *Skipper,* this Court did, indeed, at one point, state that it could not conclude that the omitted evidence "had no effect upon the

jury's deliberations"; yet, it must also be recognized that, subsequently in the opinion, this Court concluded that the death sentence at issue had to be vacated because there was a "reasonable likelihood" that the exclusion of the evidence had effected the jury's decision and, further, that the exclusion of the evidence had been "sufficiently prejudicial" to constitute reversible error. *Skipper,* 476 U.S. at 8-9. Thus, even on the basis of *Skipper,* it would appear that the Court of Appeals below applied an incorrect legal standard, in determining whether the *Hitchcock* error was harmless. Certiorari should be granted to resolve this issue.[8]

In conclusion, this Court should grant certiorari to review, and quash, the decision below. Thirteen years after his conviction and sentence of death, Booker has been awarded relief on his fourth habeas corpus petition; interestingly, in the first petition, a different panel of the Eleventh Circuit concluded that Booker had failed to demonstrate prejudice in regard to any allegation that the jury instructions had violated *Lockett, Booker,* 703 F.2d at 1259-1260 [A58-A60], and later panels determined that his two subsequent petitions for writ of habeas corpus had constituted abuses of the writ. This result would hardly seem to further the interests described so eloquently by this Court in its recent decision in *McCleskey v. Zant,* ____ U.S. ____, 111 S.Ct. 1454 (1991). What is particularly intolerable at this point is that Booker has been awarded relief based upon absolutely no showing of prejudice or harm. The panel of the Eleventh Circuit which granted relief applied a legal analysis squarely at odds with that employed by other panels of the same court and with that employed by the Supreme Court of Florida, which, utilizing the same record, concluded that any-

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8 Even if this Court should adhere to the standards set forth in *Chapman v. California,* 386 U.S. 18 (1967), which some panels of the Eleventh Circuit regard as controlling, Petitioner would respectfully submit that the State has met its burden of proof under this analysis.

Hitchcock error in this case had been harmless. While Petitioner fully recognizes that some violations of *Hitchcock* cannot in fact be found harmless, especially in cases in which the propriety of the death sentence is open to serious debate, this case is not one of them. For the Court of Appeals to suggest that with proper instruction the jury in this case would have reached a life recommendation on the basis of such "evidence" as that involving Booker's "remorse", his mendacious statement that if he committed the crimes, he *would* be sorry, is an insult to the intelligence of anyone ever connected with this case, especially when one considers the particular brutality and heinousness of the murder for which Booker has been sentenced to death. The decision below is in every respect contrary to this Court's decision in *Hitchcock,* and certiorari should be granted.

CONCLUSION

WHEREFORE, for the aforementioned reasons, Petitioner respectfully prays that the petition for writ of certiorari will be granted.

Respectfully submitted,

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